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CITATIONS

759687—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 264

WALKER-HILL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 95–97) are reported in 66 F. Supp. 679. The opinion of the Circuit Court of Appeals (R. 135–141) and the dissenting opinion (R. 141–142) have not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 17, 1947 (R. 143). The petition for a writ of certiorari was filed on August

14, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals properly reversed the District Court's ruling that the brandy eggnog manufactured by the taxpayer, containing a fifteen percent alcoholic content by volume, and eighty-five percent of which was sold to liquor dealers, was a food product unfit for use as a beverage and sold for other than beverage purposes within the meaning of Section 3250 of the Internal Revenue Code, as amended.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 8–14.

STATEMENT

This is a suit to recover taxes under the drawback provisions of Section 3250 of the Internal Revenue Code, as amended, by the petitioner, the Walker-Hill Company, an Illinois corporation with offices in Chicago, Illinois (R. 95).

During the years 1942 and 1943, the petitioner manufactured an eggnog sold under the brand names of "Martin's" and "Dukas" Brandy Egg Nog, which eggnog contained in each 200 gallons: 750 pounds of egg material; 20 gallons of milk; 496 pounds of sugar and dextrose; 65 gallons of

100 proof distilled spirits; and flavoring (R. 95). The spirits used in the manufacture of petitioner's eggnog were produced in a domestic registered distillery and were fully tax-paid (R. 96).

On September 28, 1942, the Alcohol Tax Unit of the United States Treasury Department advised the petitioner that a sample of its eggnog made in conformity with the formula listed above was "unfit for beverage use and does not incur special and commodity taxes." (R. 95.) This advice was subsequently determined to have been erroneous (R. 7–8), and petitioner's claims for drawback of taxes on distilled spirits denied by the Commissioner (R. 96–97).

At the trial which was a consequence of the Commissioner's disallowance of the drawback claims timely filed (R. 96–97), medical testimony established that normal persons could not ingest enough of petitioner's eggnog to cause them to exhibit the effect of alcohol, and that the milk and eggs inhibited the effects of the alcohol (R. 95–96).

Rejecting the contrary findings of the District Court (R. 95–96), on the basis of which judgment had been entered for petitioner (R. 101), the Circuit Court of Appeals held that the petitioner's eggnog was a "beverage" within the meaning of the statute involved (R. 135–141). It noted that liquor dealers constituted eighty-five percent of the purchasers of the petitioner's product, and that

the label on petitioner's eggnog gave instructions for its use as a "food beverage" (R. 140). Accordingly, the Circuit Court of Appeals reversed the judgment of the District Court (R. 143), with one judge dissenting (R. 141–142).

ARGUMENT

1. The court below has denied the petitioner a "drawback" on taxes paid on the distilled spirits used in its eggnog on the ground that the eggnog did not meet the statutory requirements that it be "unfit for beverage purposes and [be] sold or otherwise transferred for use for other than beverage purposes." Sec. 602 (f) (1) (1) of the Revenue Act of 1942, Appendix, *infra*, p. 10. The petitioner claims (Pet. 6–10) that this decision is in conflict with the decision of the Court of Claims in *Hoffman Beverage Co.* v. *United States*, 71 F. Supp. 147, particularly on the ground that the phrase "beverage purposes" should be interpreted to mean *intoxicating* beverage use.

But whether the word "beverage" in the statute means only intoxicating beverage was not an issue in the *Hoffman* case, it having been agreed "that the expression 'beverage purposes' in the statute means use as an alcoholic drink." 71 F. Supp. at 150. This was done pursuant to the regulation involved in the *Hoffman* case, Section 190.5, paragraph (d) of Treasury Regulations 15 (Appendix, *infra*, p. 12), applicable to the "flavoring extracts and sirups" used by Hoffman in the manufacture

of its ginger ale and Tom Collins Mix, and specifically describing the "beverage purposes" for which the product must be "unfit" as "intoxicating." On the other hand, the regulation here sought to be invoked by petitioner (R. 136, 139), Regulations 15, Section 190.5, paragraph (i), Appendix, *infra,* p. 12, does not contain the adjective "intoxicating."

Finally, the court below ruled only that the drawback provisions of the statute did not apply to petitioner's eggnog where that product was nonintoxicating only in the sense that it is "likely to nauseate a consumer before intoxication occurs" (R. 140). In this light, the nonintoxicating attribute of petitioner's product is a far cry from the nonintoxicating characteristics of Hoffman's ginger ale and Tom Collins mix in the manufacture of the sirup for which a small amount of spirits were used.

2. Petitioner also contends (Pet. 10–12) that the Government was estopped from denying its drawback claims by the previous administrative ruling. However, the decision of the court below on this point is in conformity with the decisions of this Court in *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, and *United States* v. *San Francisco,* 310 U. S. 16, cited in the majority opinion. The petitioner says that the decision below is in conflict with the decision of this Court in *Miller* v. *Nut Margarine Co.,* 284 U. S. 498

(Pet. 10). But nothing in that case suggests that the Government may be estopped from collecting or retaining a valid tax; there the tax was held wholly improper and the collector's discriminatory imposition of the invalid tax criticized as arbitrary and oppressive and so enjoinable.

3. Petitioner's contention (Pet. 12–13) that the decision of the court below violates Rule 52 (a) of the Federal Rules of Civil Procedure is without merit. The reversal of the decision of the District Court by the court below was based not only upon the former's improper interpretation of the term "beverage purposes", but also on account of the absence of any evidence to establish, or tending to establish, the fact that petitioner's eggnog was not sold as a beverage. A showing to that effect is required by the drawback statute. See Appendix, *infra,* p. 10. With liquor dealers constituting 85 percent of the purchasers, and with the burden resting on the petitioner, the Circuit Court of Appeals said it could not approve a finding which holds that the eggnog was not sold as a beverage (R. 140).

The petitioner has wholly ignored that part of the statute which, during the period in question, required a claimant for drawback to sell its product for other than beverage purposes. The record establishes that the eggnog was sold to liquor dealers by the petitioner (R. 45, 47, 72–73) and by Henry B. Dukas the single distributor

(R. 57), and while some of the directions on the label described possible non-beverage uses, no effort was made by petitioner to prove that it sold its product for other than beverage purposes. The liquor dealers sold the eggnog to customers for consumption on the premises just as they did other alcoholic beverages (R. 63–79).

The District Court's finding that petitioner's eggnog was not sold as a beverage was clearly erroneous and was properly set aside by the court below.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
STANLEY M. SILVERBERG,
SEWALL KEY,
ROBERT N. ANDERSON,
BENJAMIN H. PESTER,
Special Assistants to the Attorney General.

SEPTEMBER 1947.

APPENDIX

Internal Revenue Code:

SEC. 2800. TAX.

(a) *Rate.*—

* * * * *

(5) *Rectified Spirits And Wines.*—In addition to the tax imposed by this chapter on distilled spirits and wines, there shall be levied, assessed, collected, and paid, a tax of 30 cents on each proof gallon and a proportionate tax at a like rate on all fractional parts of such proof gallon on all distilled spirits or wines rectified, purified, or refined in such manner, and on all mixtures produced in such manner, that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of section 3254 (g): *Provided,* That this tax shall not apply to gin produced by the redistillation of a pure spirit over juniper berries and other aromatics.

* * * * *

(26 U. S. C. 1940 ed., Sec. 2800.)

SEC. 2801. RECTIFIED SPIRITS.

* * * * *

(e) *Rectifying.*—

(1) *Regulations.*—The business of a rectifier of spirits shall be carried on, and the tax on rectified spirits shall be paid, under such rules, regulations, and bonds as may be prescribed by the Commissioner, with the approval of the Secretary. The Commissioner, with the approval of the Secre-

tary, shall prescribe such regulations under this section and paragraph (5) of section 2800 (a) as he deems necessary.

* * * * *

(26 U. S. C. 1940 ed., Sec. 2801.)

SEC. 3250. TAX.

* * * * *

(f) *Rectifiers.*—

(1) *Rate of Tax.*—Rectifiers of distilled spirits shall pay a special tax of $200: *Provided,* That any rectifier of less than 500 barrels a year, counting 40 gallons of proof spirits to the barrel, shall pay $100.

* * * * *

(26 U. S. C. 1940 ed., Sec. 3250.)

SEC. 3254. DEFINITIONS.

* * * * *

(g) *Rectifier.*—Every person who rectifies, purifies, or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete, and every wholesale or retail liquor dealer who has in his possession any still or leach tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, and every person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any material, manufacture any spurious, imitation, or compound liquors for sale, under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying: * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 3254.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 602. DISTILLED SPIRITS.

* * * * *

(c) *Drawback On Distilled Spirits.*—The third paragraph of section 2887 is amended by striking out "$4" and inserting in lieu thereof "$6".

* * * * *

(f) *Drawback If Distilled Spirits Used For Certain Purposes.*—Section 3250 (relating to taxation of distilled spirits) is amended by inserting at the end thereof the following new subsection:

"(l) Manufacturers Or Producers Of Designated Nonbeverage Products:

"(1) *In General.*—Any person using distilled spirits produced in a domestic registered distillery or industrial alcohol plant and fully tax-paid in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts which are unfit for beverage purposes and are sold or otherwise transferred for use for other than beverage purposes upon payment of a special tax per annum, shall be eligible for drawback as hereinafter provided for.

* * * * *

"(5) *Drawback.*—A drawback at the rate of $3.75 on each proof gallon shall be allowed on distilled spirits tax-paid and used as provided in this subsection and be due and payable quarterly upon filing of a proper claim with the Commissioner. No claim under this subsection shall be allowed unless filed with the Commissioner within

the three months next succeeding the quarter for which the drawback is claimed."

(26 U. S. C. 1940 ed., Supp. V, Sec. 3250.)

Treasury Regulations 15 (1940 ed.):

SEC. 190.4 *Rectifier defined; exceptions.*—Any person who rectifies, purifies, or refines distilled spirits or wines, or who, by mixing such spirits or wines with each other, or with any materials, manufactures any spurious, imitation, or compound liquor for sale, and every wholesale or retail liquor dealer who has in his possession any still or leach tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, is a rectifier and must qualify as such, except the following:

* * * * *

(d) *Manufacturers of alcoholic compounds.*—Persons who manufacture alcoholic compounds which are declared by the Commissioner to be unfit for use for beverage purposes. (See Article V.)

* * * * *

SEC. 190.5. *Description of products.*—The following products are considered as meeting the requirements for exemption from special and commodity taxes:

(a) *U. S. P., N. F., and A. I. H. Preparations.*—Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, the National Formulary, or the American Institute of Homeopathy, that are unfit for use for beverage purposes.

(b) *Patent medicines.*—Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(c) *Toilet preparations.*—Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(d) *Flavoring extracts.*—Flavoring extracts, sirups, and concentrates that are unfit for use as beverages or for intoxicating beverage purposes. Flavoring extracts which conform to the requirements of the Food and Drug Administration, United States Department of Agriculture, are held to be unfit for use for beverage purposes.

(e) *Laboratory reagents.*—Laboratory reagents, stains, and dyes that are unfit for use for beverage purposes.

(f) *Salted wines.*—Salted wines which contain not in excess of 21 per cent alcohol by volume and not less than 1.5 grams of salt per 100 cubic centimeters.

(g) *Sauces.*—Sauces or sirups consisting of sugar solutions and intoxicating liquors in which the alcohol does not exceed 12 per cent by volume and the sugar content is not less than 60 grams per 100 cubic centimeters.

(h) *Brandied fruits.*—Brandied fruits consisting of solidly packaged fruits, either whole or segmented, and only sufficient liquor for flavoring and preserving.

(i) *Food products.*—Food products such as mincemeat, plum pudding, and fruit cake where only sufficient liquor is used for flavoring and preserving; and ice cream and ices where only sufficient liquor is used for flavoring purposes.*

SEC. 190.6. *Restrictions.*—The foregoing products must be sold only for nonbeverage purposes. Any sale by the manufacturer for beverage purposes, or under such circumstances as would indicate that the man-

ufacturer knew or had reason to believe that the product sold would be used for beverage purposes, will render the manufacturer liable for special and commodity taxes and penalties. (*; Secs. 2800 (a) (5), 3254 (g), I. R. C.)

Treasury Regulations 29 (1942 ed.):

SEC. 197.20. DRAWBACK.—Drawback at the rate of $3.75 on each proof gallon of fully tax-paid distilled spirits used in the manufacture of medicines, medicinal preparations, food products, flavors, or flavoring extracts which are unfit for use for beverage purposes and which were sold or otherwise transferred for use for other than beverage purposes will be allowed to any person who has become eligible for such drawback by payment of the special tax at the rates prescribed in section 197.8, and upon the filing of a claim therefor as hereinafter provided. (Sec. 3250 (1), I. R. C.)

SEC. 197.21. CLAIMS.—The claim shall be filed on Form 843, "Claim," in triplicate, with the collector of internal revenue for the district in which the place of manufacture is located, and shall pertain only to nonbeverage products sold or otherwise transferred during any one quarter of the fiscal year, and only one claim may be filed for each quarter. (Sec. 3250 (1), I. R. C.)

SEC. 197.30. NATURE OF RECORDS.—Every person intending to claim drawback on distilled spirits used in the manufacture or production of nonbeverage products must keep a permanent record showing the following data:

(a) The quantity, proof, and kind of distilled spirits received.

(b) Name and address of the person from whom the spirits were received.

(c) Kind of container and serial number thereof, serial number of certificate of tax-payment (if tank car), serial number of tax-paid distilled spirits stamp (if barrel, drum, can, or case), or serial number of strip stamp (if bottle).

(d) Date on which received.

(e) Number of proof gallons and kind of distilled spirits used in the manufacture of each product, and the date of use.

(f) Name of each product in the manufacture of which distilled spirits were used.

* * * * *

SEC. 197.31. EXCEPTION.—The manufacturer need not keep the records required by items (h), (i), and (j) of section 197.30 where the nonbeverage product contains less than 3 percent of distilled spirits by volume, nor shall such records be required where nonbeverage products are sold by the producer direct to the consumer in retail quantities. The Commissioner may at any time require the keeping of such records upon at least five days' notice to the taxpayer. (Sec. 3250 (l), I. R. C.)

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